

IDAHO 401 GUIDANCE

1. INTRODUCTION

Section 401 of the federal Clean Water Act requires any applicant for a federal license or permit to conduct any activity which may result in a discharge into navigable waters to provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate that the discharge will comply with applicable provisions of the Clean Water Act and state Water Quality Standards. This guidance document addresses 401 certification with respect to those federal licenses and permits that the Department of Health and Welfare, Division of Environmental Quality (DEQ) addresses the majority of the time: National Pollutant Discharge Elimination System (NPDES) permits issued by the federal Environmental Protection Agency (EPA), permits issued by the Army Corps of Engineers pursuant to section 404 of the Clean Water Act, and licenses for hydroelectric facilities issued by the Federal Energy Regulatory Commission (FERC). There may also be other permits and licenses for which DEQ must provide certification that are not addressed specifically by this guidance document.

Section 401 requires states to establish procedures for public notice in the case of all applications for certification and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.

Section 401 provides that the state must act on a request for certification within a reasonable period of time, which cannot exceed one year, after receipt of the request, or the certification requirement shall be waived.

Federal agencies have further defined the “reasonable period of time” within which a state must make its 401 certification decision. For both NPDES permits and permits issued pursuant to section 404 of the Clean Water Act, states generally have sixty (60) days to provide certification decisions, unless the federal agency agrees a longer period of time for certification is warranted. For licenses issued by FERC, states have one year from the date the request for certification is received to provide certification.

With respect to NPDES and section 404 permits, notice that the state of Idaho will consider 401 certification is included within the federal notice regarding the permit. No such notice is provided with respect to FERC licenses.

DEQ is the agency designated in the state of Idaho to make 401 certification decisions. In the fiscal year 1998, DEQ reviewed 982 applications for certification and made 185 site visits pertaining to certification. Currently, the duties of this program are coordinated from the DEQ State Office and administered from six regional offices.

DEQ has set forth in this guidance document time frames and procedures it intends to follow with respect to most 401 certifications. Through the implementation of this

guidance document, it is DEQ's goal to ensure a consistent state-wide process that will provide adequate public notice and an opportunity to comment with respect to DEQ's 401 certification decisions. The implementation of this process and the scope of public involvement as set forth in this document will depend upon the applicable federal requirements and time lines, DEQ resources, and the level of public involvement already provided by federal agencies. The success of implementing this guidance document will also depend upon the willingness of federal agencies, specifically EPA and the Army Corps of Engineers, to cooperate with DEQ and to allow adequate time for DEQ to provide independent public involvement. DEQ anticipates developing a memorandum of understanding or other inter-agency agreements to facilitate implementation of this guidance document.

This guidance document first sets forth guidance applicable to all the federal permits and licenses addressed by this document. Separate procedures and time lines for certification with respect to NPDES permits, FERC licenses and 404 permits are then described.

2. GUIDANCE APPLICABLE TO ALL FEDERAL PERMITS OR LICENSES

1. INFORMATION TO SUPPORT THE REQUEST FOR 401 CERTIFICATION

In order to make its 401 certification decision, DEQ must have adequate information. It is the obligation of the permit or license applicant to provide sufficient information that establishes there is a reasonable assurance that the discharge will comply with applicable provisions of the Clean Water Act and state Water Quality Standards. The required information will depend upon the circumstances and permit or license involved.

DEQ will work with applicants and the federal licensing or permitting agency in order to ensure the receipt of information relevant to the 401 certification decisions. In certain circumstances, it will be particularly important that the federal licensing or permitting agency provide DEQ with the basis for the limits and requirements set forth in the permit or license. For example, EPA should provide to DEQ the basis for water quality based effluent limits in NPDES permits.

2. DEQ 401 CERTIFICATION DECISION

Section 401 of the Clean Water Act allows DEQ to waive certification (either expressly or by operation of law), deny the certification, grant the certification, or grant the certification with conditions.

If DEQ denies certification, the federal agency cannot issue the federal license or permit. Depending upon the circumstances and the applicable federal requirements and time lines, DEQ may deny the certification without prejudice, allowing the applicant to request certification again. As explained below, this

may be appropriate when insufficient information is provided to allow DEQ to make its certification decision.

DEQ may grant certification with conditions. Pursuant to section 401(d), the certification may include any effluent limitations and other limitations and monitoring requirements necessary to ensure that the applicant for the federal license or permit will comply with applicable sections of the Clean Water Act and state Water Quality Standards and with any other appropriate requirement of state law. Any such conditions shall become a condition on the federal license or permit.

With respect to NPDES permits, DEQ may also include in its certification a statement indicating the manner in which the permit can be made less stringent and still comply with state Water Quality Standards. This may include alternative limitations or requirements.

DEQ cannot provide certification unless it has sufficient information to establish there is a reasonable assurance the discharge will comply with state Water Quality Standards and the applicable sections of the Clean Water Act. DEQ will attempt to work with the federal agencies and applicants in order to receive adequate relevant information. However, DEQ may deny certification if such information is not provided in a timely manner. Under certain circumstances, and depending upon the federal time lines and requirements, the denial may be without prejudice allowing the applicant to develop additional information and reapply for certification. The applicant may withdraw the request for certification in order to develop additional information and then reapply for 401 certification, dependent upon federal restrictions.

DEQ's final decision regarding 401 certification may be appealed by the applicant or "other aggrieved person" pursuant to the Idaho Environmental Protection and Health Act, Idaho Code § 39-107(6) and the Idaho Administrative Procedure Act. Such an appeal is a prerequisite to any district court action and must be initiated by filing a petition for a contested case in accordance with the Rules Governing Contested Case Appeals and Declaratory Rulings (IDAPA 16.05.03) within thirty-five (35) days of the date of DEQ's decision regarding the 401 certification.

3. GUIDANCE FOR SPECIFIC PERMIT DECISIONS

1. NPDES PERMITS

1. Federal Regulations

The Clean Water Act regulations, 40 CFR § 124.53, provide that, if the state has not provided 401 certification by the time EPA issues its draft NPDES permit, EPA shall send the state a copy of the draft permit and a statement that the state will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time not to exceed sixty (60) days from the date the draft permit is mailed to the state, unless the EPA regional administrator finds that unusual circumstances require a longer time.

40 CFR § 124.53(e) provides that the state certification shall include: (1) conditions which are necessary to assure compliance with the applicable provisions of the Clean Water Act, state Water Quality Standards and appropriate requirements of state law; (2) any conditions more stringent than those in the draft permit which the state finds necessary to meet the requirements under the Clean Water Act or other appropriate state law; and (3) a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of state law, including state Water Quality Standards.

40 CFR § 124.55(c) provides that a state may not condition or deny a certification on the grounds that state law allows a less stringent permit condition.

40 CFR § 124.55(d) provides that recertification may be required when a condition in a draft permit is changed in a manner that is not consistent with the certification provided by the state.

2. EPA Region 10 Current Practices

Pursuant to the discretion allowed the Regional Administrator under the Clean Water Act and the implementing regulations, EPA Region 10 has developed procedures it generally follows with respect to NPDES permits. Under EPA Region 10 current practices, EPA will provide DEQ with the application for the permit and, in some circumstances, a copy of a preliminary draft permit. DEQ may provide comments on the application or preliminary draft permit. EPA then issues a draft permit and a public notice that includes notice to the public that the state will consider 401 certification. After considering any public comments received, EPA then prepares a proposed final permit and provides this proposed final permit to DEQ for certification. DEQ typically is provided thirty (30) days from the date of receipt of the proposed final permit to provide certification. Subsequent to DEQ's certification decision, EPA will make its final decision regarding the permit and, when appropriate, issue the final permit.

3. DEQ's Certification Procedures (see attached Flowchart)

1. As indicated above, under EPA's Region 10 current practices, DEQ often receives information and a preliminary or proposed draft NPDES permit from EPA prior to the issuance of the draft permit. DEQ will request a continuation of this policy. DEQ may provide comments to EPA regarding the preliminary draft permit or the permit application.
2. EPA will issue a draft NPDES permit. EPA is required to publish notice to the public and an opportunity for the public to comment on the draft permit. The public comment period is a minimum of thirty (30) days. The notice published by EPA Region 10 also notifies the public that DEQ will consider 401 certification. DEQ will request EPA continue this practice. DEQ will also request EPA include in its notice a statement regarding the opportunity to request notice of DEQ's preliminary 401 certification decision and the opportunity to comment on that decision as described below.
3. DEQ intends to provide the public with the opportunity to review and comment on preliminary 401 certification decisions. Within thirty (30) days of the issuance of the draft NPDES permit, any person may request in writing that DEQ provide that person notice of DEQ's preliminary 401 certification decision, including, where appropriate, the draft certification. Within thirty (30) days of the receipt of such a request, DEQ will provide to the requesting party notice of DEQ's preliminary 401 certification decision,

including any draft 401 certification, based upon DEQ's review of the draft NPDES permit. DEQ will allow a thirty (30) day period from the date of its preliminary decision in which it will receive comments on the draft decision.

4. A public hearing for the NPDES permit may also be provided. DEQ may coordinate with EPA so that a public hearing addresses both permit and certification issues.
5. DEQ will, after considering any comments on its preliminary 401 decision, issue its final 401 certification decision. DEQ will provide notice regarding the final decision. If EPA agrees to continue its current practice of providing DEQ with a proposed final permit that has been prepared after consideration of public comments on the draft permit, then DEQ's certification will be based upon the proposed final permit. If DEQ is not provided with a proposed final permit, then DEQ will provide its final certification decision based upon the draft permit. In the event the final NPDES permit is inconsistent with the state certification, DEQ shall require EPA submit the permit for recertification.

The process described above will depend upon coordination and agreement with EPA Region 10 NPDES permit staff. DEQ will not be able to implement this procedure unless EPA allows DEQ sufficient time to issue a draft 401 decision and receive comments on that decision prior to the expiration of the deadline for 401 certification. DEQ may request an extension of the 401 certification period from EPA in order to implement this guidance.

2. FERC RELICENSING

1. Federal Law and Regulations

The Federal Energy Regulatory Commission (FERC) generally has authority to license non-federal hydroelectric projects located on navigable waters. Because such facilities include a discharge to surface water, a 401 certification is required for the issuance of the FERC license.

Most hydroelectric projects in the United States are operating under their original license that was issued for a period of fifty (50) years. In order to operate beyond the original license period, the facility must obtain a new license from FERC. A number of facilities in Idaho are in or soon will be in the process of obtaining such a new license.

The relicensing process traditionally involves three stages of consultation activities. The third stage of consultation is initiated

by the filing of an application for a new license. 18 CFR § 16.8(d)(1). At this time, the applicant must provide FERC with either: (a) a copy of the state's 401 water quality certification; (b) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (c) evidence of waiver of certification. 18 CFR § 16.8(f)(7).

A state is deemed to have waived the certification requirements if the state has not granted or denied certification by one year after the date the state received a written request for certification. 18 CFR § 16.8(f)(7)(ii).

Any amendment to an application for a license requires a new requirement for certification if the amendment would have a material adverse impact on the water quality as result of the discharge from the project. 18 CFR § 16.8(f)(7)(iii).

FERC provides no specific notice to the public that the state is considering 401 certification.

2. DEQ 401 Certification Procedures (see attached Flowchart)
 1. Within a reasonable time after receiving a request for certification regarding a hydroelectric facility license (normally within thirty (30) days), DEQ shall provide notice to the public regarding the receipt of the request. The notice shall be provided by: (a) mailing copies of the notice to intervenors in the FERC proceedings and other interested parties identified through the FERC consultation process; and (b) publishing notice in a newspaper in the manner provided for like public notices under Idaho law. If publishing notice in a newspaper is determined to be impractical, DEQ shall use other means that provide reasonable notice to the affected public.
 2. The notice will also indicate the time lines for DEQ to issue a draft certification decision, for public comment and the opportunity to request a hearing as set forth below. The notice shall also indicate where documents relating to the license and 401 certification can be reviewed by the public.
 3. Ninety (90) days prior to the date DEQ must provide its certification (DEQ certification must be provided within one year of receipt of the request for the certification), DEQ shall provide notice to the public that it has made its preliminary decision regarding the 401 certification. If DEQ's decision is to issue 401 certification, a copy of the draft certification may be obtained upon request from DEQ. The notice will be provided to the public in the manner described in paragraph a above. The notice will describe

the public's opportunity for comment and the right to a hearing as described in paragraph d below.

4. The public may provide written comments to DEQ regarding the 401 certification. The comment period shall extend for forty-five (45) days after the date DEQ issues notice of its preliminary decision. Within fifteen (15) days of the date of notice of the preliminary decision, any person may request a public hearing or meeting in order to submit oral comments to DEQ. If DEQ determines a public hearing or meeting is appropriate, the meeting or hearing shall be held within the forty-five (45) day comment period, unless a later date is warranted.
5. DEQ will issue its final decision regarding the 401 certification within one year of the date DEQ received the request for certification. DEQ will provide notice to those parties that commented on the preliminary decision regarding its final decision.

3. INDIVIDUAL 404 PERMITS

1. Federal Law and Regulations

Section 404 of the Clean Water Act provides authority to issue permits for the discharge of dredged or fill material into waters of the United States, including wetlands. This authority is implemented by the Army Corps of Engineers (Corps).

Federal regulations require the Corps make a determination regarding whether an application for a 404 permit is complete. 33 CFR § 325.1(d)(9); 33 CFR § 325.2(a)(2). The Corps issues public notice of the receipt of a complete application. 33 CFR § 325.2(a)(2). If the activity requires a 401 certification, the public notice must include a statement concerning the 401 certification requirements. 33 CFR § 325.2(b); 33 CFR § 325.3(a)(8).

If 401 certification is required, the Corps' district engineer shall notify the applicant that 401 certification is necessary. 33 CFR § 325.2(b)(1). The certification requirement will be deemed waived if the state does not act on the 401 certification request within sixty (60) days of its receipt, unless the Corps determines a shorter or longer period is reasonable for the state to act. If a longer period of time is determined reasonable, based upon information provided by the state, the Corps may allow a longer period of time to certify, not to exceed one year. 33 CFR § 325.2(b)(1)(ii).

With respect to Corps activities for the discharge of dredged or fill material, the public notice regarding the activity constitutes the request to the state for 401 certification. 33 CFR § 336.1(b)(8).

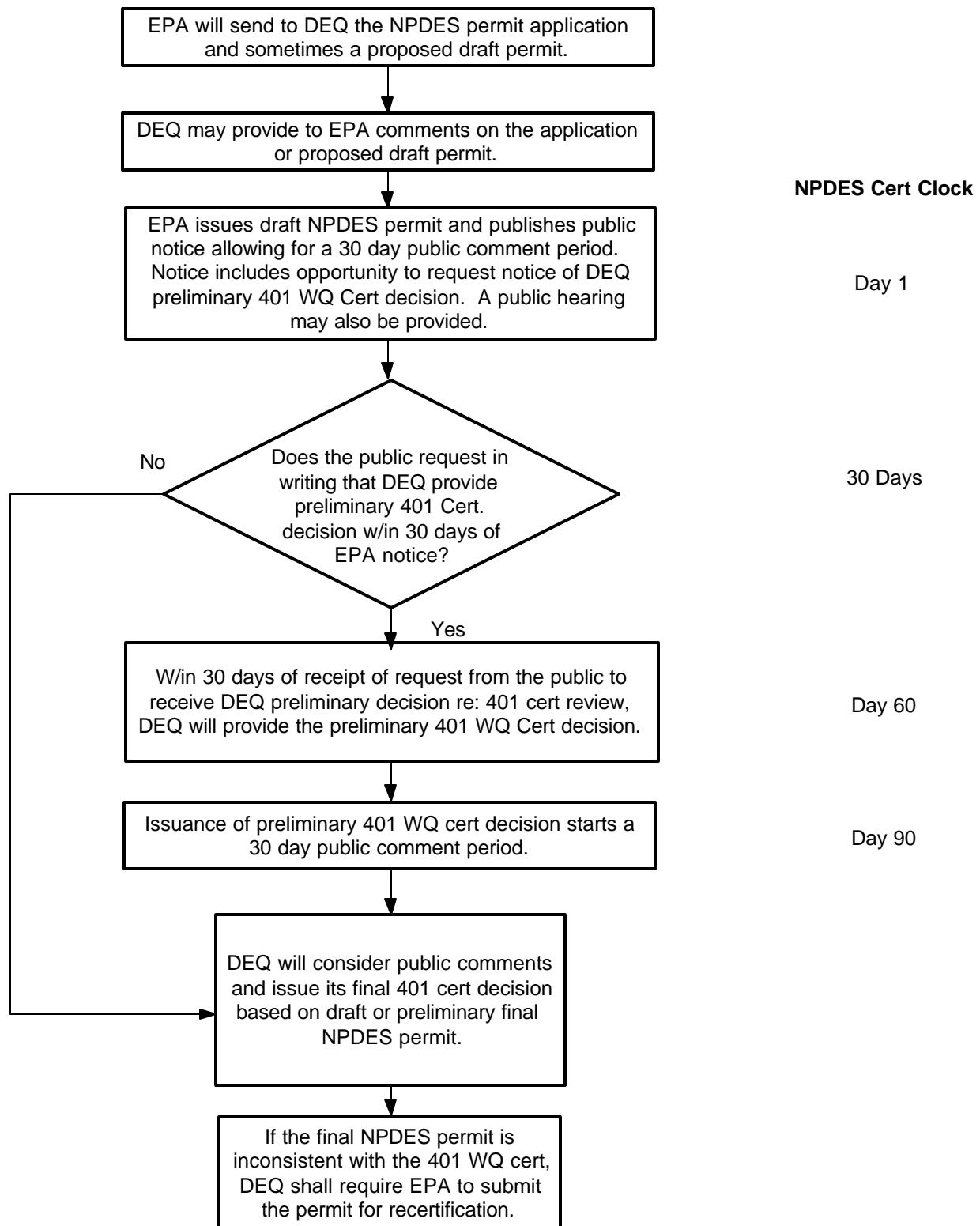
2. DEQ Procedures (see attached Flowchart)
 1. The public notice regarding the 404 permit application or Corps activities includes notice to the public regarding the state's 401 certification. DEQ shall request the Corps additionally include, in its state of Idaho notice, a statement regarding the opportunity to request notice of the state's preliminary 401 certification decision and the opportunity to comment as described below.
 2. Within thirty (30) days of the public notice regarding the 404 permit, any person may request in writing that DEQ provide that person notice of DEQ's preliminary 401 certification decision. If DEQ receives such a request, then DEQ shall request the Corps allow DEQ additional time within which to make its certification decision in order to accommodate the review of a draft 401 decision. If the Corps grants DEQ's request, DEQ shall, within thirty (30) days of receipt of the applicant's request for certification, or a longer time if necessary and allowed by the Corps, provide notice to the requesting party regarding DEQ's preliminary 401 certification decision, including any draft certification. DEQ shall receive written comments regarding the preliminary decision for a thirty (30) day period from the date of the notice of the preliminary decision.
 3. DEQ shall, after considering any public comments received, provide its final decision regarding 401 certification. DEQ shall provide notice of its final decision.

The process described above will depend upon coordination and agreement with the Corps. If the Corps declines to provide an extension for 401 certification as described herein, DEQ shall issue its final 401 certification within the time provided, without any independent public notice or opportunity for comment.

THIS DOCUMENT IS INTENDED TO IMPROVE INTERNAL MANAGEMENT OF DEQ AND TO ASSIST IN MAINTAINING A CONSISTENT STATE-WIDE APPROACH TO 401 CERTIFICATION. THIS DOCUMENT DOES NOT CREATE A RIGHT OR BENEFIT, SUBSTANTIVE OR PROCEDURAL, ENFORCEABLE AT LAW OR EQUITY BY ANY PARTY VS. DEQ, ITS EMPLOYEES OR ANY OTHER PERSON.

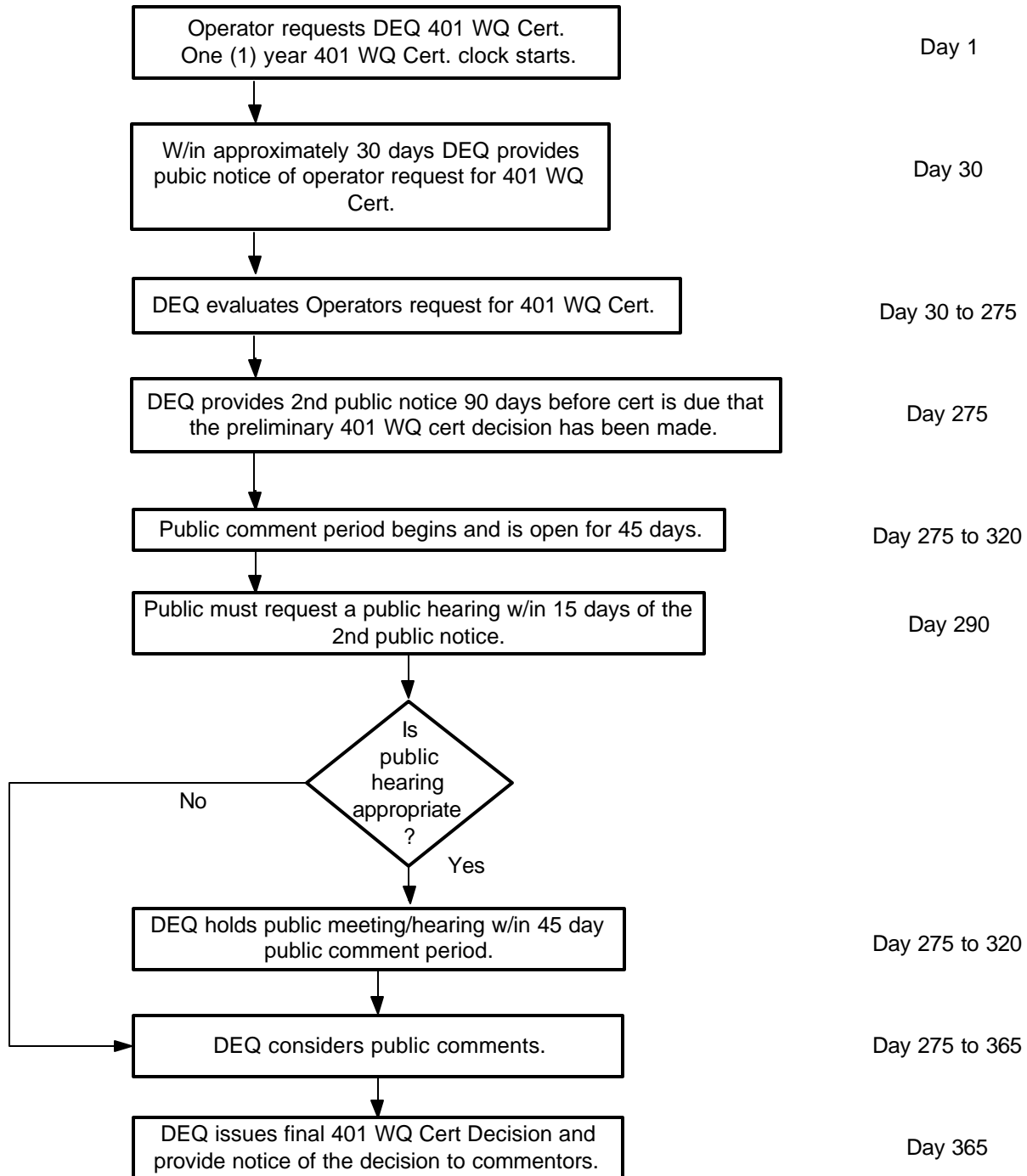
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NPDES 401 CERTIFICATION PROCESS



FERC RELICENSING FLOW CHART

FERC CERT CLOCK



404 Permit Flow Chart

